

(d) An applicant who owns an unincorporated business will be considered as an “individual” rather than a “sole owner of an unincorporated business” if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant’s direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. An individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

[57 FR 33268, July 28, 1992, as amended at 63 FR 13116, Mar. 18, 1998]

§ 2610.106 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the Office was substantially justified. The position of the Office includes, in addition to the position taken by the Office in the adversary adjudication, the action or failure to act by the Office upon which the ad-

versary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant because the Office’s position was substantially justified is on the Office. No presumption arises that the Office’s position was not substantially justified simply because the Office did not prevail.

(b) If, in a proceeding arising from an Office action to enforce an applicant’s compliance with a statutory or regulatory requirement, the demand of the Office is substantially in excess of the decision in the proceeding and is unreasonable when compared with that decision under the facts and circumstances of the case, the applicant shall be awarded the fees and other expenses related to defending against the excessive demand, unless the applicant has committed a willful violation of law or otherwise acted in bad faith or special circumstances make an award unjust. The burden of proof that the demand of the Office is substantially in excess of the decision and is unreasonable when compared with such decision is on the applicant. As used in this paragraph, “demand” means the express demand of the Office which led to the adversary adjudication, but it does not include a recitation by the Office of the maximum statutory penalty in the administrative complaint, or elsewhere when accompanied by an express demand for a lesser amount. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance.

(c) Awards for fees and expenses incurred before the date on which a proceeding was initiated will be made only if the applicant can demonstrate that they were reasonably incurred in preparation for the proceeding.

(d) An award under this part will be reduced or denied if the Office’s position was substantially justified in law and fact, if the applicant has unduly or unreasonably protracted the proceeding, if the applicant has falsified the application (including documentation) or net worth exhibit, or if special circumstances make the award unjust.

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